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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1628

TELEPROMPTER CORPORATION and
CONLEY ELECTRONICS CORPORATION, *Petitioners,*

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
CALVADA PRODUCTIONS, a joint venture,
JACK CHERTOK TELEVISION, INC. and
DENA PICTURES INCORPORATED, *Respondents.*

No. 72-1633

COLUMBIA BROADCASTING SYSTEM, INC.,
CALVADA PRODUCTIONS, a joint venture,
JACK CHERTOK TELEVISION, INC., and
DENA PICTURES INCORPORATED, *Petitioners,*

v.

TELEPROMPTER CORPORATION and
CONLEY ELECTRONICS CORPORATION, *Respondents.*

On Writs of Certiorari to The United States Court of Appeals for The Second Circuit

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BRIEF AS AMICI CURIAE ON BEHALF OF CONSUMERS UNION OF UNITED STATES, INC. AND CONSUMER FEDERATION OF AMERICA, URGING REVERSAL IN NO. 72-1628 AND AFFIRMANCE IN NO. 72-1633

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INTEREST OF AMICI CURIAE[1]

The interests in these cases of Consumers Union of United States, Inc. and Consumer Federation of America

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[1] Pursuant to Rule 42, Paragraph 2, there have been lodged with the clerk the written consents of all parties to these cases.

stem from their responsibilities to their members and the public to protect the rights of American consumers in the functions of our economic system and the development of public policies. Both organizations have diverse national membership bases from which they seek to advance the interests of consumers in creating and maintaining decent living standards. Over the years, both groups have identified shortcomings and worked to improve the quality and diversity of service offered by mass communications media.

Consumers Union of United States, Inc. with approximately 375,000 individuals as members, is the nation's largest consumer organization. Organized in 1936 as a non-profit corporation under the laws of New York to provide information and counsel to consumers, Consumers Union engages in extensive testing of products and evaluation of services and publishes test results and general consumer information in its monthly manazine, *Consumer Reports*, which has a paid circulation of approximately 2.2 million readers. In its columns, considerable attention has been given to problems of television commercials, the content of programming and licensing and regulation of commercial television broadcasters. Consumers Union, on behalf of its members, takes public positions on many such issues of importance to consumers and advances those positions before administrative agencies and the courts.

Founded in 1968 under the laws of New York, Consumer Federation of America consists of 180 member organizations concerning with protecting consumer interests. These include state and local consumer groups and national organizations of credit and labor unions, cooperatives and publicly owned utilities. On behalf of its members, CFA represents consumer interests in pending legislation, monitors the performance of federal regulatory agencies and serves as a clearing house for consumer-oriented information. CFA has supported efforts to achieve improved television programming for children, permanent financing for public broadcasting, and availability to the public of subscription television service. Most

recently, in policy resolutions adopted in July 1973, CFA adopted a range of consumer-oriented principles for cable television development centering on a commitment that this new medium "must not be allowed to develop primarily as an extension of the existing commercial system of broadcasting but rather must present a truly alternative and unique service." One key step identified to achieve this goal is that owners of cable facilities "should be divorced from program control."[2]

Divorcing ownership of cable facilities from responsibility for programming is the essence of the regulatory philosophy viewing cable television systems as *carriers* to subscribers of programming produced by other entities—both broadcast television stations and commercial or not-for-profit entities generating programming solely for cable distribution. Both Consumers Union of United States, Inc. and Consumer Federation of America view the carrier approach as the appropriate organizing principle for the future exploitation of cable (or "broadband") communications, through which major reforms in the quality and variety of television programming and other types of information services can be secured for the American people.

Because these cases require that the functions of cable television service be identified, judicial recognition of cable television's role as a carrier to subscribers is suggested as the proper perspective in which copyright liability for carriage of "distant" broadcast signals should be determined. The *amici* believe and assert herein that cable television's carrier function is a way of actualizing viewers' rights to information and therefore does not give rise to liability

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[2] Consumer Federation of America, *Policy Resolutions Adopted July 21, 1973*, p. 2.

for royalty payments under the Copyright Act. Consequently, it is respectfully submitted that argument on behalf of the interests of cable television viewers will be pertinent and helpful in the resolution of these cases.

STATEMENT

These cases present important questions of law and policy under both the Copyright Act of 1909, as amended, 17 U.S.C. §1, and the Communications Act of 1934, as amended, 47 U.S.C. §§151 *et seq.*, specifically:

1) What is the function of community antenna television ("CATV") or "cable television" service in delivering "distant" broadcast television signals to subscribers? and

2) Does this function give rise to liability under the Copyright Act?

In *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), this Court adopted a functional approach in determining that CATV systems were not liable for copyright payments. The Court held that a claim of copyright infringement must be viewed in the light of the "drastic technological change" that has occurred in communications since enactment of the copyright law, making it necessary that "the function that CATV plays in the total process of television broadcasting and reception" be precisely limned. 392 U.S. at 396, 397. Both courts below applied such a functional test to the facts of these cases but reached opposite conclusions. On review, the full implications of cable television's evolving technology and of the multiplicity of consumer services which the advent of the cable increasingly makes possible for the American people must be appreciated.

Finding no copyright liability in *Fortnightly*, the Court recognized that cable service falls on "the viewer's side of the line," between television broadcasting and reception,

392 U.S. at 399, at least with respect to the antenna-type systems there in question. Inasmuch as the Court noted there that its holding dealt with CATV systems "generally" but rested upon particular facts involving only carriage of "local" television signals, 392 U.S. at 400, f.n. 25, 392 U.S. at 392, f.n. 6, the instant cases have been brought to test the extent to which the *Fortnightly* finding of no copyright liability might differ for cable television systems providing certain other types of services. No. 72-1628 pertains to carriage of "distant" broadcast signals generally and No. 72-1633 to carriage of such distant signals by cable systems that may also a) originate television programming, b) sell advertising, or c) interconnect with other cable distribution systems. Thus the breadth and generality of the *Fortnightly* holding is in issue in these cases, which present some additional aspects of the complex phenomenon of cable television development.

Outside a narrow copyright context, this Court has also dealt with the functions of cable television service in cases brought under the Communications Act of 1934, culminating last term in *U.S. v. Midwest Video Corp.*, 406 U.S. 649 (1972). *Midwest Video* upheld the authority of the Federal Communications Commission under the Communications Act—another statute long predating the advent of cable television—to authorize carriage of broadcast signals by certain cable systems only upon the condition that original programming not televised by broadcast stations be carried as well. The Court's recent opinions in *Midwest Video* illuminate the functions of cable television service and the emerging role of cable television as a "carrier" for subscribers of television and other forms of communications and hence merit consideration in the Court's identification of cable television's functions in this case.

Clarity with respect to cable television's actual and potential functions is all important to determining whether carriage of "distant" broadcast signals is a "performance" under the Copyright Act. Inasmuch as *Fortnightly* teaches that

construction of that Act in accordance with its "ordinary meaning and legislative history" is insufficient, 392 U.S. at 395, it is important to keep in mind the evolutionary potentiality of cable television service as well as the record of its past development. Piecemeal presentation of cable television's emerging capabilities could skew the assessment of "the function CATV plays in the total process of television broadcasting and reception." 392 U.S. at 397.

ARGUMENT

CARRIAGE AND DISTRIBUTION OF BROADCAST TELEVISION SIGNALS BY CABLE TELEVISION SYSTEMS IS A CARRIER SERVICE TO SUBSCRIBERS FOR WHICH NO COPYRIGHT PAYMENT IS DUE, NOT A PERFORMANCE GIVING RISE TO LIABILITY FOR FEES.

Long ago, this Court recognized that the copyright law "makes reward to the owner a secondary consideration." *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948). This court has raised this right of viewers to Constitutional dimensions under the First Amendment, in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), where it held, "It is the right of the viewers and listeners, not the right of broadcasters, which is paramount. . . . That right may not constitutionally be abridged either by Congress or the F.C.C." 395 U.S. at 390. The First Amendment, the Court has emphasized, assures that this viewer's right must be viewed expansively, reaching "the widest possible dissemination of information from diverse and antagonistic sources. . . ." *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945). Thus, in interpreting the reach of the statutory copyright monopoly, this Court should not "draw the line" between broadcaster and viewer so as to negate the viewer's constitutional right to receive the widest possible

selection of available television programming.[3] *Harmon v. Brucker*, 355 U.S. 579 (1958). *Fortnightly Corp. v. United Artists Television*, 392 U.S. 397, 398-9 (1968).

In these cases, copyright owners have sought to impose upon cable television systems additional fees beyond those paid by broadcast stations, thereby curbing the ability of the novel cable medium to increase the public's viewing options through distributing television programs broadcast outside the normal range of reception of the standard television set. The Court is thus being asked to choose between protecting the copyright holder's expectancy for stable profits and resistance to changing market conditions, on the one hand, and supporting the public's aspirations for improving its access to available informational, entertainment, and cultural programming, on the other. In terms of the thrust of the copyright law, the exclusion of viewers from liability for reaping the benefits of progress in reception technology is clearly implied and, indeed, constitutionally required.

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[3] The cable television viewer's reception right may, nonetheless, be made subject to regulation "no more than is reasonably required to effectuate the public interest requirements of the [Communications] Act," consistent with inviolability under the First Amendment. *Buckeye Cablevision Inc. v. F.C.C.*, 387 F.2d 220, 225 (D.C. Cir., 1967), citing *National Broadcasting Co. v. United States*, 319 U.S. 190, 226-7 (1943). Presently, the "importation" of distant signals into "major television markets," "smaller television markets," and communities "outside of all major and smaller television markets" is closely regulated by the F.C.C. under a system of quotas of importable signals keyed to the size of particular markets or communities and the presumed ability of local broadcast stations to compete successfully with added television service. See 47 C.F.R. §§76.51-76.65 and the careful elaboration of present F.C.C. policies in *Cable Television Report and Order*, 37 Fed. Reg. 3252, 3253-3269 (1972) and *Reconsideration of Cable Television Report and Order*, 37 Fed. Reg. 13848, 13849-13857 (1972).

The following subsection of this Argument addresses the implications of the Copyright Act for claims of cable system liability for carriage of distant broadcast signals, in accordance with the functional approach adopted by this Court in *Fortnightly*. Next, we consider the implications of cable television's emergence as a carrier of programming to viewers for the assessment of cable television's function in these cases, in the light of the policy determinations of the F.C.C. and the holdings of this Court. Finally, we treat the likely consequences of judicial recognition here of cable television's carrier status for the future evolution of this novel medium.

A. *Since the Copyright Act of 1909 Does Not Make Express Provision for Cable Television Service, This Court Should Resolve The Copyright Claims in These Cases by Recognizing The Basic Function of Cable Service as a Tool of Viewers Facilitating Television Reception.*

1. The Evolutionary Context

Use of coaxial cable as a method of reception for television signals[4] commenced on a small scale in the late

[4] The coaxial cable provides a wholly self-contained path for transmitting electrical impulses from one point to another, offering significant improvement for certain purposes over both the "wire pair" used for local telephone distribution and carriage of television broadcasting over the radio spectrum. Coaxial cable contains a thin copper core surrounded by a larger-diameter outer conductor. Separation of the elements by plastic foam permits the creation of an electrical field. The entire system is surrounded by a flexible protective sheath. Telephone pairs in use in the United States typically carry only one "full-voice" circuit with a 4,000 cycles per second (four kiloHertz) bandwidth. Much greater bandwidth is required for a single television channel. United States television channels are standardized at six million cycles per second (six megaHertz). As a result, only a limited

(continued)

1940's, long after the passage of the Copyright Act.[5] Today, there are estimated to be 2,996 operating cable systems in the United States, serving 5,406 communities and reaching about 7.25 million homes containing about 22.5 million people.[6] Approximately 450 systems originate some programming from their own studios, and an equal number accept advertising. In 1972 total revenues from subscriber fees were $391 million. The growth of service over the past 25 years has been slow but steady. Projections for future growth vary widely, reflecting such uncertainties as the strength of consumer demand, the hospitality of public regulation, the availability of capital, and the pace of technological progress.[7]

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[4] (continued) number of television signals can be broadcast in any geographic area, since the spectrum is limited and shared by many users. By contrast, the current transmission range of coaxial cables (from three to about 270 megaHertz) potentially could permit simultaneous carriage of 66,500 four-kiloHertz voice circuits or 44 six-megaHertz television channels, or mixes or variations of both types of signals. Use of multiple cables could expand such carriage, virtually without limitation, on a one- or two-way basis. *See* Barrow & Manelli, Communications Technology—A Forecast of Change, 34 *Law & Contemp. Prob.* 205 (1969).

[5] *See, United States v. Southwestern Cable Co.*, 392 U.S. 159, 162, fn. 12 (1968).

[6] Source for these and subsequent statistics: *Broadcasting Cable Sourcebook 1974*, p. 4.

[7] "We have chosen to assume . . . that some new signals, derived primarily from over-the-air production, will be made immediately available [by the F.C.C.], and that growth will continue at more or less the current rate. Upon these broad assumptions, the Commission estimates that by the end of the decade, or perhaps shortly thereafter, penetration will be in the general range of 40 to 60 percent, and that in metropolitan areas penetration is likely to be substantially higher." Sloan Commission on Cable Communications, *On The Cable: The Television of Abundance*, pp. 38-9 (McGraw-Hill, 1971). The effect of (continued)

Since the inception of cable service, changes in technology and evolution in function have been the rule. Originally, service was limited to the type whose copyright liability was tested in *Fortnightly*—community antenna facilities acquiring television broadcast programs for local distribution. Later, capacities for acquiring broadcast programs were increased by microwave transmission, prior to distribution to subscribers, sometimes in more than one community. The availability of excess channel capacity through one or more coaxial distribution cables has created opportunities for television programming never broadcast over the air to be produced and distributed to subscribers over the cable. Nor are such transmissions confined to the cable necessarily limited to television formats, but a range of additional informational and data services is now possible, on a *two-way* basis. However, extensive use of this capability for businesses, governments and consumers depends critically on aggregating sufficient penetration of homes and businesses and developing sophisticated terminal hardware in response to the scale of such demand.[8] Community antenna television service thus launched a progression toward the eventual wiring of the Nation, gradually making more real the possibility that a universal electronic marketplace for information and ideas responsive to public tastes and needs will come into being, via broadband telecommunications.

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[7] (continued) demands for services on the part of municipal franchising authorities and adverse developments in the availability of investment capital has made such projections questionable, especially for major urban areas. *See* 85 *Broadcasting* 21 (October 8, 1973).

[8] "Several companies are now experimenting with prototype subscriber terminals. They cost close to $1,000 today, but further development and mass production may reduce the price to $100 or so by 1980." Baer, *Cable Television: A Handbook for Decision-making*, p. 26 (The Rand Corporation, 1973).

As cable television matures, its functions multiply. Thus, the types of service able to be offered subscribers in 1974 differ somewhat from those offered in 1949, and will differ considerably by the end of the century. So long as the areas served by cable are limited and saturation of potential subscribers in any area is partial, economic factors inhibit the nature of service subscribers may secure over the cable. As more and more people can receive cable television service, however, the value of the cable television audience to programmers of all sorts will increase. Innovation in both the content of communications and its transmission and reception technology will flourish in a market of scale. Increasingly, access to cable services will become a practical necessity of life in the United States.

The viewer's access to distant broadcast signals via the cable has played a critical pacing role in the evolution and the wide availability of cable services. In only limited areas of the country, where distance and terrain features impede good broadcast reception, can service of the type before this Court in *Fortnightly* attract sufficient cable subscriptions to make service economical. Where over-the-air reception is of acceptable quality, additional television programming is needed to attract subscriptions. Once cables are in place, the possibility that unique television and non-television services can be provided over the cable becomes real.

Thus, the subscriber's interest in extending the reach of his television viewing apparatus is expansive—evolving from capturing local television, to increasing his selection of over-the-air television programming, to creating new opportunities for commercial and non-commercial television programming, and, finally, to opening up a two-way communications "highway" to and from his home or business for a wide variety of electronic services of which television will be only a part. Change is key to growth, and growth is key to change.

2. The Role of Viewer Control

Against this background and projection towards the future, the claim of copyright interests for protection under the Copyright Act against cable carriage of distant broadcast signals must be assessed. In *Fortnightly*, this Court framed the ambit of the copyright monopoly for broadcast television as the "effective range of the broadcast," reflective of "the combined contribution of the equipment employed by the broadcaster and that supplied by the viewer." 392 U.S. at 398.

Thus, the key parties in determining liability are the broadcaster and the viewer, with the cable television system's responsibilities deriving from the tasks it performs for viewers based upon its contractual arrangements with subscribers and its franchise with a local public authority. Despite the present paucity of instances where cable systems are owned by cooperatives or municipalities—although the number may be expected to grow in the future—a cable system is no less "equipment . . . supplied by the viewer" by reason of the fact that its ownership is in separate hands, rather than in the viewer himself, since its functions are defined in strict contractual undertakings and it plays no independent role with respect to content of broadcast programs. 392 U.S. at 400. What the viewer may do himself, he may also do through a cable system as his agent,[9] as this Court recognized in *Fortnightly*. *Ibid.* The Court of Appeals overlooked entirely this crucial element of viewer control over a cable system's reception function, which the Copyright Act, as interpreted by this

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[9] What the cable system does in addition to serving the viewer in this fashion, moreover, can in no way diminish its role, on the viewer's behalf, in serving the viewer. Even the sale of advertising *on origination channels* (implied by the copyright parties in No. 72-1633 as showing departure from an agent's role) cannot detract from a system's service to viewers *on broadcast reception channels;* to a degree, such sale of advertising is comparable to the production by telephone companies of "yellow pages" directories without destroying their carrier role under local regulatory regimes.

Court in *Fortnightly*, makes central to the determination of liability for the reception of broadcast television. Moreover, the distinctions advanced by the copyright petitioners in No. 72-1633—premised upon certain additional entrepreneurial activities also undertaken by some cable systems that carry distant signals (program origination, sale of advertising, and interconnection)—can in no way diminish the role of cable systems in serving the viewer's right to receive royalty-paid broadcast programming, nor can such activities operate to transform delivery of programming to subscribers into a "performance." In fact, to the extent these additional activities strengthen a system's ability to serve subscribers by enhancing its revenue base, and hence its capacity for universal coverage of its area and the quality and diversity of its services, cable television's basic function as a means of actualizing the television's viewer's rights is effectuated rather than diminished.

3. The Viewer's Reception Equipment

Nor should the particular equipment used by or on behalf of the viewer alter the fundamental nature of the reception function which that equipment serves. The Court of Appeals erroneously chose to apply a wholly static measure to the technology making cable reception possible, holding that "the meaning of 'distant signal' must be determined in the light of the current broadcasting and receiving technology." (Pet. in No. 72-1628, App. A, p. 22a) In *Fortnightly*, however, this Court had deliberately cast its holding generally, "in the light of drastic technological change," 392 U.S. at 396. Moreover, in these cases the Court of Appeals remanded to the District Court the task of determining the function played by cable transmission equipment in particular factual circumstances, although this Court had clearly intimated in *Fortnightly* that there was no controlling significance whatsoever to the particular "equipment . . . supplied by the

viewer" for receiving broadcast television.[10] 392 U.S. at 398. The distinctions drawn by the Court of Appeals according to the nature of the apparatus used for delivery of broadcast signals are thus wholly artificial and inconsistent with the reality that, in delivering both "local" and "distant" signals, cable systems serve an identical reception function for subscribers.

As this Court recognized in *Fortnightly*, the Copyright Act made no express provision for the advent of cable television "in any manner envisaged by the Congress that enacted the law in 1909." 392 U.S. at 395. Nor, for that matter, was the gradual and continuing evolution of the medium reflected specifically in the concept of "performance" embodied in that Act. Nonetheless, the distinction in functions expressed in the structure of the Act, as perceived by this Court in *Fortnightly*, clearly puts the carriage of distant signals by cable television systems on the same footing as carriage of local signals. As this Court held, performance is complete when broadcasters generate electronic signals, which viewers must convert into visual images. 392 U.S. at 398. The versatility of the viewer's equipment for acquiring those electronic signals does not alter the role of the broadcaster as "active performer" or the viewer, aided by cable television service, essentially, as "passive beneficiary" despite certain "active" aspects of reception, with or without cable service. 392 U.S. at 399. Regardless of the source of broadcast programming received over the cable, the viewer's function remains the same.

Nor do the other capabilities or uses combined in the reception apparatus in any way alter the viewer's right to

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[10] A distinction comparable to the approach taken by the Court of Appeals is set out in Justice Fortas's dissent in *Fortnightly*, 392 U.S. 402, 407 (1968), which was thus expressly before this Court as it rendered its broad holding "with respect to CATV generally." 392 U.S. at 400, fn. 25.

tune his set to receive broadcast signals—local or distant—once broadcast, as intimated by the petitioners in No. 72-1633. Thus, in addition to the conversion of broadcast television signals to visual images, the viewer's apparatus may be designed to enable him to play a phonograph record or a video cassette in his own home on his own set; to receive a "feed" from a cable television "head-end" of original television, voice, or "data bits"; or to enable the subscriber himself to put a similar variety of information into and through the cable system from his own home. In each instance, there should be no cause for liability in broadcast reception.

4. Conclusion

Indeed, the capacity of a cable system to serve differing functions is ultimately probative of the distinction between its role in facilitating viewer reception and the broadcaster's separate role. Cable production of original television programming is, without a doubt, a function that gives rise to copyright liability, by the system itself when it conducts origination[11] or by other entities making use of cable facilities. Mere carriage of programming, however, whether it be broadcast or original on the cable, should not be a "performance" subject to copyright liability.

Lacking specific statutory provision making cable systems liable for distant signal carriage,[12] the Copyright Act cannot

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[11] Cable operators pay copyright fees for such originated programming. "It was stipulated that respondents secured appropriate permissions and copyright licenses when necessary for their CATV-originated programs. JA 164." Brief in Opp. in No. 72-1633, p. 7.

[12] As recognized by the Court in *Fortnightly*, Congress has long attempted, without success, to legislate an amendment to the Copyright Act making specific provision for limited copyright payments

(continued)

be construed to require payment of fees for the reception by subscribers over cables of broadcast programming. Present copyright law and policy do not permit the levy upon viewers of such a tithe on technological ingenuity.

B. *Nothing in the Communications Act of 1934 Constrains the Evolution of Cable Television as a Carrier for Television Viewers or Authorizes Converting that Function into Broadcast-Type Performance.*

Like the Copyright Act, the Communications Act of 1934 long predates the advent of cable television and has never been specifically amended with respect to the role and functions of that medium.[13] Nonetheless, this Court

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[12] (continued) for cable carriage of distant signals. 392 U.S. at 396, fn. 17. Subsequently, representatives of affected industries have negotiated a "Consensus Agreement" as a broad framework for possible legislation. *See, Cable Television Report and Order*, 37 Fed. Reg. 3252, 3260-1, 3341 (1972). A bill designed to implement the terms of that Agreement, S.1361, is currently pending before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee.

[13] Congressional activity on proposals with respect to cable television has been entirely unproductive from the outset of consideration, when the only bill ever enacted emerged from Congress without its CATV provision: Act of July 7, 1960, 74 Stat. 363, *amending* 47 U.S.C. §§318-19 (requiring rebroadcast stations to obtain an operator's license). Another cable bill was debated in the Senate and sent back to committee in the same Congress. S. 2653, 86th Cong., 1st Sess. (1959) (to place cable under the jurisdiction of the FCC and to provide it should not be deemed a common carrier); *see* 106 CONG. REC. 10,416-36,10,520-48 (1960). During the 89th Congress, one bill was reported from the House Committee on Interstate and Foreign Commerce but died in the House Rules Committee. H.R. 13286, 89th Cong., 2d Sess. (1960) (to authorize the FCC to issue rules and regulations).

(continued)

has held that the Federal Communicatons Commissions created by the Communications Act is authorized to regulate cable systems. *United States v. Southwestern Cable Co.*, 392 U.S. 157; 178 (1968). *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972). See also, *General Telephone Co. of California v. F.C.C.*, 413 F.2d 390 (D.C. Cir., 1969), *cert. denied*, 396 U.S. 888 (1969). Pursuant to that authority, the F.C.C. has commenced to regulate certain aspects of cable television activities[14] and has under

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[13] (continued) No action has ever been taken on other bills and resolutions introduced in Congress. *See* H.R. 5310, 93d Cong., 2d Sess. (1973); H.R. 17113, 92d Cong., 2d Sess. (1973); H.R. 15757, 92d Cong., 1st Sess. (1972); S. 2427, 92d Cong., 1st Sess. (1971); S. 792, 92d Cong., 1st Sess. (1971); S. 3635, 91st Cong., 2d Sess. (1970); H.R. 10510, 91st Cong., 1st Sess. (1969); H.R. 10268, 91st Cong., 1st Sess. (1969); S. 3017, 89th Cong., 2d Sess. (1966); H.R. 14837, 89th Cong., 2d Sess. (1966); H.R. 14454, 89th Cong., 2d Sess. (1966); H.R. 14201, 89th Cong., 2d Sess. (1966); H.R. 13286, 89th Cong., 2d Sess. (1966); H.R. 12914, 89th Cong., 2d Sess. (1966); H.R. 7715, 89th Cong., 1st Sess. (1965); S. 1044, 87th Cong., 1st Sess. (1961); H.R. 6840, 87th Cong., 1st Sess. (1961); H.R. 11041, 86th Cong., 2d Sess. (1960); S. 1801, 86th Cong., 1st Sess. (1959); S. 1741, 86th Cong., 1st Sess. (1959); S. 1739, 86th Cong., 1st Sess. (1959); S. 2653, 86th Cong., 1st Sess. (1959); H.R. 8319, 86th Cong., 1st Sess. (1959); H.R. 7666, 86th Cong., 1st Sess. (1959); H.R. 6937, 86th Cong., 1st Sess. (1959); H.R. 6748, 86th Cong., 1st Sess. (1959); H.R. Res. 284, 91st Cong., 1st Sess. (1969); H.R. Res. 248, 91st Cong., 1st Sess. (1969); H.R. Res. 201, 91st Cong., 1st Sess. (1969); H.R. Res. 84, 91st Cong., 1st Sess. (1969); H.R. Con. Res. 206, 91st Cong., 1st Sess. (1969); H.R. Con. Res. 315, 88th Cong., 2d Sess. (1961).

[14] Comprehensive rules governing carriage of broadcast television, access to and use of nonbroadcast channels, technical standards, and federal-state/local relationships were set forth in *Cable Television Report and Order*, 37 Fed. Reg. 3252 (1972) and codified at 47 C.F.R. Part 76. See also *Reconsideration of Cable Television Report and Order*, 37 Fed. Reg. 13848 (1972).

continuing review a number of key aspects of that novel medium's role and functions.[15]

As pointed out by the cable television parties, the key elements of their activities said to give rise to copyright liability have been sanctioned or mandated by the F.C.C. (Pet. in No. 72-1628, pp. 47-50, Opp. in No. 72-1633, pp. 19-21). The *amici* view the existence of a broad and evolving pattern of F.C.C. regulation as bearing significantly on the resolution of the copyright claims, freeing cable systems from liability for distant signal carriage, but not by reason of the holding in *Farmers Union v. WDAY*, 360 U.S. 525 (1959), on which the cable television parties rely. Rather, the F.C.C.'s regulatory scheme for cable television serves authoritatively to define the medium's functions and thus controls the results of the functional appraisal mandated by this Court in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 396, 397 (1968).

Pursuant to its statutory obligation "to encourage the larger and more effective use of radio in the public interest" (47 U.S.C. §303(g)), the Commission has embarked on a complex and continuing effort to define for cable television "its appropriate role in a total communications structure."[16]

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[15] For example, all issues relating to cable television regulatory policy, rulemaking and/or possible legislative proposals (Docket No. 18397) were reopened by the Commission for reconsideration, following the issuance of *Cable Television Report and Order*. See *Reconsideration of Cable Television Report and Order*, 37 Fed. Reg. 13848, 13864 (1972). Presently, the Commission is engaged in extensive rulemaking deliberations pertaining to cablecasting for which a per-program or per-channel charge is made. *Notice of Proposed Rulemaking and Memorandum Opinion and Order in Docket No. 19554*, 37 Fed. Reg. 15773 (1972).

[16] *Cable Television Report and Order*, 37 Fed. Reg. 3252, 3253, par. 19 (1972).

Significantly, the Commission—the agency charged by Congress "with broad responsibilities for the orderly development of an appropriate system of local television broadcasting," *U.S. v. Southwestern Cable Co.*, 392 U.S. at 177—has consistently recognized the valuable function of cable television systems "for increasing the number of local outlets for community self-expression and for *augmenting the public's choice of programs and types of service, without use of spectrum.*" *Mid-west Television, Inc.*, 13 F.C.C. 2d 478, 505 (1968) (emphasis added). The Commission has, accordingly, adopted for itself the goal "to integrate the CATV service into the national television structure in such a way as *to promote maximum television service to all people of the United States. . . .*" *Second Report and Order in Dockets No. 14895, 15233, and 15971*, 31 Fed. Reg. 4540, par. 47 (1966) (emphasis added). While noting the evolutionary character of cable systems, the Commission has articulated as an abiding and fundamental goal the development of such systems in such a way that they will be "supplementary" to television broadcast service.[17] The clear thrust of regulatory effort to shape the development of cable television has been to differentiate cable television service from the broadcast function.

In addition to negating that cable systems are "broadcasters" in any sense that might lend support to the claim that they "perform" when they carry distant broadcast signals, the F.C.C. has affirmatively recognized and attempted to effectuate the evolution of cable service generally as a *carrier* responsive to subscriber tastes and needs.[18] In its most

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[17] *Ibid.*

[18] The F.C.C. has advocated that cable systems should be encouraged to carry television programs not broadcast over the air, originated either by themselves or others on a leased basis. *Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397*, 33

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recent set of regulations, the Commission has mandated that cable sytems which serve 3,500 or more subscribers must also carry television programming not broadcast, so as to "operate to a significant extent as a local outlet by origination cablecasting. . . ." 47 C.F.R. §76.201(a), *replacing* 47 C.F.R. §74.1111 per 37 Fed. Reg. 3252, 3278 (1972), *rules suspended,* 36 Fed. Reg. 10876 (1971).[19] Even though the Commission has stopped short of labeling cable systems "common carriers" broadly—viewing such treatment as "premature," *Cable Television Report and Order,* 37 Fed. Reg. 3252, 3272, par. 146 (1972), in favor of more pragmatic and evolutionary steps—the Commission has recognized that such an approach "may prove sound eventually." *Reconsideration of Cable Television Report and Order,* 37 Fed. Reg. 13848, 13857, par. 68 (1972).

For the present, the F.C.C. has articulated a finding that cable systems "are neither broadcasters nor carriers within the meaning the Communications Act," but "[r]ather a

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18 (continued) Fed. Reg. 19028, 19030, 19032 (1968); *First Report and Order in Docket No. 18397,* 34 Fed. Reg. 17651, 17652 (1969); *Reconsideration of First Report and Order in Docket No. 18397,* 35 Fed. Reg. 10901, 10902 (1970); and *Cable Television Report and Order,* 37 Fed. Reg. 3252, 3269-3272 (1972). Present regulations provide for all new systems constructed in "major markets" after March 31, 1972 (and all systems in being prior thereto, after March 31, 1977) that there be made available, within the limits of channel capacity, at least one channel for "public access," educational and local government purposes, and the remainder of available channels for "leased access." 47 C.F.R. §76.251(a)(4)-(7).

19 47 C.F.R. §74.1101(j) had provided that mandatory origination could be satisfied either by the cable operator "or another entity." It was replaced by rules 47 C.F.R. §§76.201(a) and 76.251 whose implications were read by this Court in *U.S. v. Midwest Video,* 406 U.S. 649 (1972) as "apparently not meant to affect a change in substance or to preclude the operator from cablecasting programs produced by others." 406 U.S. at 653, fn. 6.

hybrid that requires identification and regulation as a separate force in communications."[20] This considered holding, on which an elaborate scheme of regulation now rests, should suffice to remove the functions of cable systems from liability for copyright royalties as performers, except insofar as such systems are themselves originating programming, when they are subject to normal copyright liabilities for that *origination* function.

Significantly, in reviewing the F.C.C.'s authority to order such originated programs, this Court's opinions in *U.S. v. Midwest Video*, 406 U.S. 649 (1972) have given considerable support to a definition of cable television's functions which precludes system liability for royalties from mere *carriage* (as opposed to origination) of television programming. The Court's plurality opinion found the Commission's mandatory origination rule regulating cable systems directly relevant to the Commission's responsibilities under the Communications Act in that it "preserves and enhances the integrity of broadcast signals," 406 U.S. at 670, and "assure[s] that in retransmission of broadcast signals viewers are provided suitably diversified programming . . .", 406 U.S. at 669. The plurality thus drew a clearly pertinent distinction between the function of broadcasters in performing programming and cable systems in carrying "suitably diversified" programming to viewers, at times beyond the normal range of broadcast reception.

Though differing from the plurality's holding that the F.C.C. has authority to order original programming over cable systems, the minority proclaimed with great clarity that a cable system is "simply a carrier having no more control over the message content than does a telephone company," and

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[20] *Cable Television Report and Order*, 37 Fed. Reg. 3252, 3277 (1972). To the extent cable systems act as carriers, they are statutorily barred from categorization as broadcasters, inasmuch as the Communications Act defines "common carrier" and "carrier" in terms which exempt "a person engaged in radio broadcasting . . . insofar as such person is so engaged . . ." 47 U.S.C. §153(h).

found that such a carrier would have to be "bludgeoned" to be classed as a broadcaster. 406 U.S. at 680. The minority opinion was based in part on "the difference between communication and origination" marked by this Court in *Fortnightly*, and on the finding there that program origination is "foreign . . . to CATV's traditional transmission of signals." 406 U.S. at 680.

Thus, both the F.C.C. and this Court have evinced clear perceptions of cable television's carrier function, though no unitary formulation can yet describe the totality of cable systems' functions. Nonetheless, there can be no real doubt that the Communications Act, as administratively and judicially construed, has removed carriage by cable systems of signals originated by other entities from the broadcaster's "side of the line." *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 399 (1968).

C. *By Clarifying the Function of Cable Television Systems as Carriers Under Present Legislation, This Court Can and Should Open the Door to Regulation Attuned to the Unique Potential of Cable Television as a Carrier for Viewers.*

In *Fortnightly*, this Court adopted a common sense approach to the problem of construing the reach of the Copyright Act, recognizing the intervening passage of time and the "drastic change" of communications technology since that statute was enacted. Failing adoption of specific statutory amendments applicable to cable, neither the Copyright Act nor the Communications Act have themselves defined cable television's functions. Yet, as shown *supra*, both this Court and the Federal Communications Commission have already recognized the emerging function of cable systems as carriers to subscribers of a diversity of television services.

That recognition can and should now be strengthened, and these cases create a timely opportunity for accelerating the natural evolution of the medium by dispelling all doubt

as to its functions,[21] via a sound and enduring rationale for the application of copyright liability to cable television. That rationale would simply be that the carriage function of cable service is *not* a "performance" but, instead, the actualization of viewers' rights, while a performance occurs only at the point where copyrighted material is broadcast or originated over the cable system. Thus, copyright liability for cable systems accrues only when and insofar as such systems are themselves engaged in originating programming.

In negating all liability for mere carriage, this Court could underline the unique and novel capacities of cable transmission to serve as a conduit for a variety and multiplicity of services to the public. Thereby, the question of the public interest in the development of these services would be expressly framed for such legislative or regulatory marshalling as the public interest may justify. On the other hand, a ruling that fails to differentiate the programming (or "performing") function from the carriage function of cable television service would vest cable systems with a clear economic interest in the *content* of programming delivered over their facilities, inasmuch as each additional channel of television delivered over the cable will be a diversion from the economic value of every other channel so distributed. The interest of subscribers in program variety would, to that extent, be secondary to the economic interest of cable operators in maximizing the value of their facilities to themselves, rather than to their subscribers. Conversely, carrier status would turn the system operator into a stimulator of programming from every possible source, benefitting copyright interests by creating a vastly wider market for their "product."

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[21] The classification by the FCC that cable is "a hybrid that requires identification and regulation as a separate force in communications," *Cable Television Report and Order*, 37 Fed. Reg. 3252, 3277 (1972) is merely a temporary resting point in the evolution of the medium. Reflecting the presence of both carriage and origination functions, it permits the launching of separate regulatory requirements governing each function, in response to various public needs over time.

To identify the novel opportunities of cable television evolution is not, however, to forecast or ordain any necessary pattern for that evolution. Nonetheless, clarity in basic guidelines will make it possible for federal and local regulation to respond constructively to novel opportunities.

Recently, increasing recognition has been given to the carrier nature of cable television service. For example, the Massachusetts Community Antenna Television Commission has adopted, as a guideline for regulating cable television systems within the Commonwealth, the "separation of ownership of cable systems from the ownership of programming and other services originated over the system."[22] The Federal Cost of Living Council, moreover, has expressly determined that a community antenna television system is a "public utility," exempt from rate control under the Phase IV price control program, "*Community Antenna Television,*" 38 Fed. Reg. 30444 (1973), thus opening the way to regulation and development of cable transmission systems in accordance with public utility philosophy. While "common carrier" status may indeed be "premature" for cable systems so long as their share of viewers is limited, recognition of the natural parameters of cable television's future growth may give a significant impetus to public policies designed to bring such growth about.

The passage of time and the development of congenial regulatory environments can speed the evolutionary process. In this process, clarity in the determination of cable's function can enhance the sureness with which investment commitments to cable services can be made and highlight the

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[22] Commonwealth of Massachusetts, Executive Office for Consumer Affairs, Community Antenna Television Commission, Press Release, April 12, 1973, p. 1.

public interest in achieving security for such investment. In the absence of federal legislation specifically defining cable functions, judicial construction of existing legislation as consistent with a carrier status can give much needed support for the fulfillment of cable's potential. On the other hand, a holding that obscures or diminishes the novel role of cable television as a carrier could significantly impede and confuse the evolution of this medium.

Beyond the thrust of the Copyright and Communications Acts, two additional relevant sources of law ultimately justify the resolution of these cases through a holding consistent with the status of cable television as a carrier for viewers:

Application of the carrier approach would recognize the emerging natural monopoly status of cable transmission,[23] which becomes increasingly pronounced as the number of cable subscribers increases and information services unique to the cable become available.[24] Thus, harmonizing communications, copyright and the antitrust laws requires that impediments to wide access by *programmers* to cable subscribers through the cable medium be resisted. Requiring cable systems to pay copyright fees for carriage of broadcast television would, to an extent, integrate transmission and programming functions and also penalize cable systems for their most pro-competitive function.

Overall and beyond an economic context, moreover, the Constitutional right of *viewers* to wide access to "social, political, esthetic, moral and other ideas and experiences" requires construction of the copyright laws to grant primacy to viewers' rights. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. at 390. The conditions of scarcity making the

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[23] *See, e.g.*, "Public Policy and Emerging Technology in the Media," 18 *Pub. Policy* 539 (1970); Posner, "Cable Television: The Problem of Local Monopoly," (The Rand Corporation, 1970).

[24] *See, e.g.*, U.S. v. Otter Tail Power Co., 409 U.S. 820 (1973).

radio spectrum a "public resource" which have given rise to a role for broadcasters as "fiduciaries"—combining in a handfull of television stations in any area the programming and distribution functions of mass communications—cannot be permitted or encouraged to spill over to the copious coaxial medium. *Compare, Office of Communication of the United Church of Christ v. F.C.C.*, 425 F.2d 543, 548 (D.C. Cir., 1969). In resolving these cases at the threshold of cable television's expansion, the rights of viewers to the fullest flowering of the novel technology at their command should now be made secure.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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